Supreme Court, U.S.
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No. 97-159

In The

Supreme Court of the United States

October Term, 1996

DEBRA BLACK,

Petitioner,

v.

ZARING HOMES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

I. WHERE AN EMPLOYEE IN A TITLE VII SEXUAL HARASSMENT CASE ADDUCES SUBSTANTIAL EVIDENCE OF GENDER-BASED VERBAL SEXUAL HARASSMENT DIRECTED TOWARD HER BY VARIOUS MALE EMPLOYEES IN THE SUPERVISORY HIERARCHY OF HER EMPLOYER, WHAT CRITERIA SHOULD FEDERAL COURTS EMPLOY IN DETERMINING WHETHER THE CONDUCT ALLEGED AGAINST THE EMPLOYER WAS SUFFICIENTLY *DE MINIMIS* SO AS TO RENDER THE EMPLOYEE'S SEXUAL HARASSMENT ALLEGATIONS NON-ACTIONABLE?

II. WHERE A TITLE VII PLAINTIFF HAS ADDUCED EVIDENCE AT TRIAL THAT SEVERAL GENDER-BASED HOSTILE REMARKS WERE DIRECTED TO HER BY VARIOUS MEMBERS OF THE ALL-MALE SUPERVISORY HIERARCHY OF HER EMPLOYER, INCLUDING ITS PRESIDENT, AND PLAINTIFF'S COMPLAINT TO THE EMPLOYER'S GENERAL COUNSEL ABOUT THE HARASSMENT WAS IGNORED, TO WHAT EXTENT MAY THE REVIEWING COURT SUBSTITUTE ITS OWN JUDGMENT FOR THAT OF A JURY AND SET ASIDE A JURY VERDICT TO THE EFFECT THAT THE EMPLOYER'S CONDUCT TOWARD PLAINTIFF WAS SUFFICIENTLY SEVERE AND PERVASIVE SO AS TO CREATE AN OBJECTIVELY HOSTILE WORK ENVIRONMENT?

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STATEMENT OF THE CASE

This Court has been fully informed of the underlying facts and procedural posture of this case in the Petition for Writ of Certiorari and Respondent's Brief in Opposition to Certiorari. (Petition, pp. 2-7; Brief in Opposition, pp. 1-3).

ARGUMENT

Respondent recently requested this Court to deny Petitioner's request for a writ of certiorari to resolve the two questions presented. On the one hand, Respondent attempts to rebut Petitioner's demonstration of a split amongst the circuit courts as to what constitutes actionable sexual harassment by claiming that "different facts" have produced the differing results. (Respondent's Brief in Opposition, pp. 4-12). However, for the remainder of its brief, Respondent argues that judges can and should resolve cases of this sort as a matter of law. (Respondent's Brief in Opposition, pp. 12-16). A close examination of Respondent's brief reemphasizes the need for guidance on these issues by this Court. Accordingly, this Court should grant Petitioner's request for a writ of certiorari.

I. The Circuit Courts Continue to Remain Split on the Issue of What Constitutes Actionable Verbal Sexual Harassment.

Stated simply, the circuit courts are split on their understanding of what constitutes actionable verbal harassment in a hostile work environment claim under Title VII. Petitioner has already provided this Court with a thorough treatment of caselaw to support this proposition. (Petition, pp. 10-17). Since the time Petitioner filed their request for a writ of certiorari, subsequent circuit court decisions have been rendered which demonstrate that the split not only remains unresolved but continues to grow wider.

The Fourth Circuit Court of Appeals has recently added their voice on the issue. Adopting the reasoning established in *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995), the Fourth Circuit has sided with the Sixth, Seventh and Tenth Circuits by endorsing a more restrictive application as to what constitutes actionable verbal harassment. *Hartsell v. Duplex Products, Inc.*, ___ F.3d ___, 1997 U.S. App. LEXIS 22545 (4th Cir. August 25, 1997). In that case, the plaintiff was the target of comments from her male co-workers and supervisors such as, "We've made every female in this office cry like a baby. We will do the same to you. Just give us time." *Id.* at *4. Further, she was referred to as one of "the little people" and informed by one of her male employers that she "would become the slave." *Id.* Additionally, the plaintiff was present when two male employers were looking at a magazine with a picture of a woman who "was rather buxom and was wearing a lowcut T-shirt," when one of the male employers commented, "Why don't we have sales assistants that look like that[?]" *Id.* at *5. Also, the plaintiff in that case was asked if after the birth of her child she would be a "mini-van driving mommy" or "be a salesperson and play with the big boys." *Id.* Finally, several male co-workers referred to the plaintiff's stay-at-home husband as her "wife" and asked her, "Why don't you go home and fetch your husband's slippers like a good little wife. . . . " *Id.* at *5-6.

The Fourth Circuit affirmed the district court's granting of summary judgment to the defendant, stating that the conduct plaintiff complained of consisted "of no more than mildly offensive (and unactionable) utterances." *Id.* at *17. The court was persuaded by the fact that many of the comments were not gender-specific. *Id.* Further, the Fourth Circuit was also highly influenced by the fact that the plaintiff was not "inappropriately touched, propositioned, flirted with, taunted, or even ogled." *Id.* at *21, (*citing Baskerville*, 50 F.3d at 431).

Hartsell is but one additional manifestation of the growing rift between the various circuits on the standard for determining *de minimis* versus actionable sexual harassment. For instance, comparing the Fourth Circuit's position as articulated in *Hartsell* with that of the Eighth Circuit's opinion in *Smith v. St. Louis University,* 109 F.3d 1261 (8th Cir. 1977), (Petition, pp. 15-16), the need for this Court to harmonize the divergent circuit decisions becomes apparent. In *Smith,* the Eighth Circuit found actionable harassment in far less aggravated conduct which essentially consisted of the chairman of a medical department referring to women residents by their first names and the male residents by the term "Doctor," commenting that it was "about time that he hired some good looking girls," and referring to the plaintiff and other women employees as "anesthesia babes." *Id.* at 1262.

Like the present case, both *Hartsell* and *Smith* dealt exclusively with alleged sexual harassment based upon various verbal statements made and/or condoned by male supervisors to female employees. A reasonable examination of the evidence of the two cases reveals the severity of the comments to be approximately equal. However, in one instance, the circuit court concluded that the comments did not rise to the level of actionable sexual harassment, while the other circuit court held that the comments clearly did support a viable claim for a hostile work environment. Some courts, such as the *Hartsell* court, appear to require actual physical touching or direct propositioning in order to support a claim. 1997 U.S. App. LEXIS 22545 at *21. On the other hand, other cases, such as *Smith,* have found actionable harassment based upon relatively milder, indirect comments. 109 F.3d at 1261.

Respondent dwells unnecessarily on what it perceives to be the low level of harassment in the case at bar as compared to other cases of verbal sexual harassment

where the circuit courts have upheld the Title VII violation. However, the issue before this Court is not how outrageous the facts of the case at bar are in comparison with the facts in other cases.[1] The facts of this case are more aggravated than those in some cases and less aggravated than those in others. The true issue which begs this Court's clarification is the standard which would be adopted to determine whether sexual harassment is sufficiently *de minimis* to be non-actionable. Should it be the

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[1] This is not, however, to concede that the facts in this case are not outrageous. All of the comments were directed to Petitioner alone, the one female in a room of several taunting males, all of them managers, including the president of the company. Conversations were permeated with female anatomical references. The double entendre of the "sticky buns" comment directed to Petitioner is particularly demeaning and humiliating. (Petition, p. 3). The reference to "sticky buns in the morning" is a crude sexual reference so obvious it need not be repeated here. What makes the facts of this case especially egregious is the fact that many of the comments were countenanced by or even uttered by the President of the company in the presence of Petitioner and her male co-workers. Additionally, when she complained to the General Counsel, who was familiar with the laws on sexual harassment, she was told nothing could be done about it, and that gender-ridicule was part and parcel of the work environment. (Petition, p. 5).

Furthermore, while the sexual harassment in the other cases relied upon by Petitioner took place over a longer period of time, the fact that all of the harassing remarks in this case occurred in a mere four month period simply highlights the concentrated nature of Respondent's misconduct.

Finally, Respondent's attempt to downplay the severity of its conduct before this Court is belied by the fact that a jury had no trouble finding its course of conduct actionable. In fact, it went the extra mile to unanimously recommend, in its jury verdict, that Respondent initiate diversity/harassment training (App. p. 24) and pay $250,000 in punitive damages. (App. pp. 28-29).

"public mores" standard (*see Baskerville*, 50 F.3d at 431; *Gross v. Burggraf Construction Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995)), the "directed at" versus the "in the presence of" standard (*see Black v. Zaring Homes, Inc.*, 104 F.3d 822 (6th Cir. 1997)),[2] or the absence-of-physical-touching standard (*see Hartsell*, 1997 U.S. App. LEXIS 22445 at *21), acknowledged by the Fourth, Sixth, Seventh, and Tenth Circuits. Or, on the other hand, should this Court be guided by whether women are exposed to onerous working conditions to which men are not exposed, the standard enunciated by the Second, Third, Eighth, and Ninth Circuits. *See Torres v. Pisano*, ___ F.3d ___, 1997 U.S. App. LEXIS 12805 at *17 (2nd Cir. 1997); *Spain v. Gallegos*, 26 F.3d 439, 447-48 (3rd Cir. 1994); *Smith*, 109 F.3d at 1263-65; *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994). This case squarely presents this Court with issues which are unresolved in the circuit courts and need clarifying. Accordingly, this Court should grant Petitioner's request for a writ of certiorari.

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[2] Respondent persists in arguing that *Black v. Zaring* does not go so far as holding that sexual comments made merely in the presence of an employee are non-actionable. Respondent cites to the Sixth Circuit's language that sex-based comments need not be directed to a plaintiff in order to be actionable, but the fact that most of the comments in this case were not directed to Petitioner merely "contributed to" its conclusion that the conduct was not severe enough to create an objectively hostile work environment. However, irrespective of what the Sixth Circuit said, the fact remains that it did not cite any other specific evidence to support its finding that the workplace was not sufficiently hostile. The Sixth Circuit did not address the issues of the frequency, humiliating, or coercive level of any of the specific remarks, nor Petitioner's degree of mental anguish. In the absence of any other specific evidence cited by or relied upon by the Sixth Circuit, one must assume that the fact that most of the comments were not directed at Petitioner constituted the sole basis for its legal conclusion.

II. The Argument Advanced by Respondent Blurs the Distinction Between Various Standards of Review and Requires Clarification by This Court.

Respondent contends that the reversal by the Sixth Circuit was proper because Respondent was not challenging the jury's conclusions, but rather was questioning to the district court's failure to grant Respondent's Rule 50 motion for a judgment as a matter of law. Accordingly Respondent contends that the Sixth Circuit appropriately conducted a *de novo* review of a legal question rather than applying the "clearly erroneous" standard associated with findings of fact. This argument highlights an issue which must be resolved by this Court: What standard of review must an appellate court employ when a trial court makes rulings that turn on questions of fact or mixed questions of law and fact? Respondent's argument blurs the distinction between rulings which must be reviewed under a "clearly erroneous" standard of review and those which should be reviewed *de novo.*

As Justice Scalia stated while writing for this Court, "[D]ecisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood,* 487 U.S. 552, 558, 108 S.Ct. 2541, 2546, 101 L.Ed.2d 490 (1988). The question of which of these standards of review is applicable becomes troublesome in a case such as the case *sub judice* where a trial court denies the Respondent's request for judgment as a matter of law because the resolution of the case is intertwined with factual issues. Subsequently, in the case at bar, the district court submitted the case to the jury which found for the Petitioner. The Respondent then appealed the trial court's denial of its Rule 50 motion to the Sixth Circuit. Respondent attempted, successfully as it turned out, an end run around the findings of the jury by its appeal under the guise of a request for a *de novo* standard of review. If the Sixth Circuit's decision is accepted, the

traditional role of the factfinder will be undercut and the power of appellate court judges will be significantly increased. Such a decision should not be sanctioned without full consideration and opinion of this Court.

Respondent argues that this case does not involve the Sixth Circuit's setting aside of a jury verdict, but rather its Rule 50 determination that the quantum of the record evidence of sexual harassment was insufficient as a matter of law to warrant submission of the case to the jury in the first place. However, this is a distinction without a difference. The issue is in truth the same: When a federal reviewing court analyzes a sexual harassment case in the context of the fact-specific criteria set forth in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367, 1226 L.Ed.2d 295 (1993), under what circumstances can the trier of fact be deprived of its ability to determine whether the *Harris* criteria have been met? Or, stated another way, to what extent may a reviewing court substitute its view of the facts for those of a jury by merely casting its decision as one where insufficient record evidence exists to allow the case to go to the jury?

As discussed fully in the Petition for Certiorari, the circuit courts are split on the amount of deference to be accorded to the factfinder in cases such as the case *sub judice*. (Petition, pp. 22-27). Additionally, the Sixth Circuit's holding runs counter to the precedent previously provided by this Court. For instance, Justice White, speaking for this Court, has stated:

> The trial judge's major role is the determinations of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that

> their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.' "

Anderson v. City of Bessemer, 470 U.S. 564, 574, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985). In the case at bar, however, Respondent was able to turn the appeal into the "main event" of the litigation. Furthermore, the approach endorsed by the Sixth Circuit will have the effect of requiring litigants to re-focus their energies and resources on persuading the appellate court to resolve issues typically reserved to the finder of fact.[3]

Furthermore, Respondent's argument faces additional problems when considered in light of this Court's statement that:

> By reason of settlement conferences and other pretrial activities, the district court may have

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[3] The flaw in Respondent's argument and, implicitly, the Sixth Circuit's holding, is best demonstrated by examining Respondent's argument in its entire context. The crux of Respondent's argument and the Sixth Circuit's holding is that reviewing courts can and should resolve sexual harassment cases such as the case at bar as a *matter of law.* (Respondent's Brief in Opposition, pp. 13-14). This argument sounds appealing until it is compared with the remainder of their argument. Respondent refutes Petitioner's claim that there is no split amongst the circuits on the standard for actionable verbal harassment by arguing that *factual distinctions* create the apparent split. On the one hand, Respondent attempts to characterize this issue as a clearly defined area which courts (either trial or appellate) should decide as a pure question of law. However, when it better serves its argument, Respondent emphasizes the highly factual nature of these cases. It is precisely these types of logical inconsistencies which are likely to be repeated should this Court refrain from providing guidance on these issues.

> insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government. Moreover, even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense, requiring the court to undertake the unaccustomed task of reviewing the entire record, not just to determine whether there existed the usual minimum support for the merits determination made by the factfinder below, but to determine whether urging of the opposite merits determination was substantially justified.

Pierce, 487 U.S. at 560, 108 S.Ct. at 2547.

Petitioner does not contend that a sexual harassment case can never be decided as a matter of law. Justice Souter, writing for this Court, recognized that issues on appeal break down into one of three types: purely legal issues, purely factual issues, and issues of mixed law and fact. *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 630, 113 S.Ct. 2264, 2283, 124 L.Ed.2d 539 (1993). Petitioner concedes the appropriateness of *de novo* review on purely legal issues, as well as on mixed question of law and fact (assuming a thorough and sufficient showing that the legal issues predominated over any factual issues). In the case at bar, however, the Sixth Circuit did not make such findings. Therefore, the issue, which this court must address is given the existence of factual issues, may a reviewing court avoid the conclusions of the factfinder by applying a *de novo* standard of review?

This Court has long recognized the significance of standards of review in various forms of litigation. *Pierce*, 487 U.S. at 558, 108 S.Ct. at 2546. Additionally this Court

has also consistently recognized that district and appellate courts each serve significant but distinct functions in the administration of justice. *Anderson*, 470 U.S. at 574, 105 S.Ct. at 1512; *Pierce*, 487 U.S. at 560, 108 S.Ct. at 547. Respondent's argument threatens to blur these well-established distinctions. This issue transcends Title VII litigation and implicates the standards of review in all civil litigation. Unless this Court grants certiorari in this instance, the clarity of these standards of review will remain muddled. The practice of allowing appellate courts to reverse jury verdicts under the guise of a *de novo* review threatens to eradicate the clearly erroneous standard of review thus resulting in reviewing courts arrogating onto themselves factfinding functions traditionally reserved for the jury. Accordingly, guidance from this Court is sought on this issue.

CONCLUSION

For the reasons set out fully above, and also for all of the reasons fully explained in Petitioner's original Petition for Writ of Certiorari, Petitioner respectfully requests that a Petition for Writ of Certiorari be granted to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

DONALD B. HORDES